The sources and backgrounds of European legal systems

CHAPTER 7

The Sources and Backgrounds of European Legal Systems

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1 Introductory Remarks

The aim of this chapter is to give some information on the legal systems of European countries, to see which laws in the field of the law of contracts, torts and property could be of influence on a European Civil Code in the future. Moreover this information will be useful since it will complement the other chapters of this book where many references to the legal systems of various European countries have been made.

The remarks in this chapter regard the legal systems in Western and Central Europe. Until recently it was common to divide the European legal systems in five groups, so-called 'legal families'. Many authors distinguished on the continent a) the French legal family, b) the German legal family, c) the Nordic legal family and d) the Socialist legal family. Furthermore, the British Isles and Ireland were described as countries belonging to e) the Anglo-American legal family.[1] However, some authors have stressed that — especially in comparison with the other legal families — there exist so many similarities between the first three mentioned legal families, it would be better to speak about a Romano-Germanic legal family with three sub-families. It goes too far to discuss this difference of opinion in this contribution.[2] After the developments in Eastern Europe in 1989 and 1990 the former socialist legal systems are in a transitory period. Many new statutes influenced by regulations and ideas from other continental European legal systems are gradually enacted in the former socialist countries and in a couple of years they probably will not constitute a separate legal family anymore. In this chapter no remarks will be made about the codifications still in force during the actual transitory period in these countries. It should be underlined as well, that a division of legal systems in legal families mainly has a didactical function. It gives some information about the general orientation of a legal system in a certain field of law.

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1 See for instance Konrad Zweigert/Hein Kötz (translated by Tony Weir), *An Introduction to Comparative Law*, vol. I, Clarendon Press, Oxford 1987.

2 See for instance Peter de Cruz, *A modern approach to Comparative Law*, Deventer 1993, 27-40.

Even though some remarks will be made about procedural law, this introduction will primarily focus on civil and commercial law.[3] Studying European legal systems in the fields of the law of contracts, torts and property, one should realise that all legal systems are largely influenced by Roman law. These influences are obvious in the continental European systems. Some rules can be traced back to regulations of the Corpus iuris civilis of Emperor Iustinian. But it should also not be forgotten that the English and Irish law have on some points been influenced by the way of thinking of Roman law, mainly caused by the fact that during the middle ages judges often had an ecclesiastical background and were educated in the principles of canonic law, which is largely influenced by principles of Roman law.

One should also bear in mind that the law of the European Communities, in the form of the treaty, council regulations and directives, today plays a large role in the legal systems of the Member States, especially in the area of commercial law. European Community law also indirectly influences the commercial law of non-Member States, since most of these states are members of the European Free Trade Association (EFTA), which has concluded an important treaty with the European Community on this matter, the European Economic Area Treaty.

2 The French Group

2.1 General Remarks

After the French Revolution a committee for the preparation of codifications on several fields of law to be introduced on the whole territory of the French Republic was established. Until that time a strong Roman law orientated system of law was in force in the southern part of modern France (pays de droit écrit), whereas in the northern part many different systems of customary laws with less Roman law influences existed (pays de droit coutumier). The committee prepared three important codes in the field of civil law, which were later enacted: a Civil Code (Code Civil, 1804), a commercial code (Code commercial, 1807) and a code of civil procedure (Code de procedure civile, 1804). The Civil Code was divided in three books: 1) law of persons and family; 2) law of property; 3) law of obligations including the law of inheritance and matrimonial property.

One has to realize, that these codes came into force at the moment that the French Republic, under the leadership of Napoleon, covered an important part of

3 Compare for short descriptions of the procedural laws of the member states of the EC: Maurice Sheridan/James Cameron (ed.), *EC legal systems; an introductory guide*, Butterworths, London 1992.

Western Europe. Therefore, these codes were immediately enforced on the territory of Belgium, Luxembourg, the southern part of the Netherlands and parts of Germany as well. In other countries of Western Europe, under the influence of France, similar codes were introduced, for example the Civil Code for the Kingdom of the Netherlands which was enacted during the reign of King Louis-Napoleon, a brother of the French Emperor.

After the decline of the French empire in 1814, the codes of the Napoleonic area stayed in force in France, but partly also in countries which formerly belonged to France or were under French influence. This was caused by the fact that it was quite generally accepted that it was valuable to have some central codifications on the most important fields of law instead of different local laws, which existed before in most European countries.

2.2 France[4]

After the liberation of France in 1945 the Civil Code of 1804 was so out of date that a revision was necessary. A commission to revise the code was established, but this was dissolved in 1958 when the Gaullist Fifth Republic was realized. It was decided that the existing code was not to be replaced by a new one and instead it was decided it should be updated to meet the requirements of the modern times. The area of family law, in particular, underwent considerable change, the major reforms being the matrimonial regimes acts from 1965 and 1985 (Loi du 13 juillet 1965 et 23 décembre 1985 sur les régimes matrimoniaux), the Filiation Act from 1972 (Loi du 3 janvier 1972 sur la filiation) and the divorce act 1975 (Loi du 11 juillet 1975 sur le divorce). These acts have all been incorporated in the Civil Code. In 1975 the code de procédure civile has been replaced by the nouveau code de procédure civile (new code of civil procedure) but some provisions of the old code remained in force since the new code was not, and still is not, completed. This has led to the situation that two codes of civil procedure exist side by side. The commercial code from 1807 still exists but it has been eroded since its main regulations have been replaced by special acts. From the original 648 sections only 140 still remain. In the fields of trading companies, commercial registers, seaborne trade, bankruptcy and the procedure before the Court of Appeal, the code has been substituted by specific acts.

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4 Xavier Blanc-Jouvan/Jean Boulouis, France, in: *International Encyclopedia of Comparative Law*, Volume I (June 1972); Alfred Rieg, Frankrijk, in D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 311-349; Martin Weston, *An English reader's guide to the French legal system*, Berg Publishers, Oxford 1991; Andrew West/Yvon Desdevises/Alain Feet/Dominique Gaurier/Marie-Clet Heussaff, *The French legal system: an introduction*, Fourmat Publishers, London 1992.

2.3 Belgium[5]

At the Congress of Vienna in 1815 the territory of Belgium and the territory of the former Republic of the United Netherlands were united as the Kingdom of the Netherlands. In the new kingdom the preparations for new independent codifications after the French model started, but before these new codes came into force the territory of Belgium was separated from the Netherlands after a revolt in the year 1830 and the Kingdom of Belgium was created. The Napoleonic codes remained in force. During the nineteenth and twentieth century these codes were modified on many points, mainly to adapt the regulations to the changing patterns of social life. Nevertheless, many of the core articles on the law of obligations and property still have the original text of the French Code Civil. Belgian court decisions and doctrine are still evidently influenced by French developments. Until 1961 only the French text of the Civil Code was authentic, since then the Dutch translation (Burgerlijk Wetboek) has authentic value as well. There still is a distinction between civil and commercial law in Belgium. Commercial law is mainly regulated by the Code de commerce (Wetboek van koophandel). This code is also still the Napoleonic one from 1807 but it has been revised in all its sections. From the original text almost nothing has remained in the contemporary version. The code on civil procedure was replaced by a new Code judiciaire (Gerechtelijk Wetboek) in 1967.

2.4 Italy[6]

In parts of Italy, the Napoleonic codes were introduced during the French rule at the beginning of the past century. After the fall of Napoleon these codes were repealed again. One has to recall, that in these days several independent states existed within the territory of modern Italy. Some of these states introduced codes after the French model in the first part of the nineteenth century. Immediately after the unification of Italy in 1861 uniform codes were enacted (Codice civile (Civil Code) 1865, commercial code 1865, code of civil procedure 1865). These codes were only partly translated copies of the French ones. In 1882 the commercial code was replaced by a new one. In the nineteen twenties a Franco-Italian committee began to draft provisions in the field of the law of obligations and contracts. The aim of this committee was to enact

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5 Jan Limpens/Guy Schrans, Belgium, in: *International Encyclopedia of Comparative Law*, Volume I (December 1972); Hans van Houtte, Belgie, in D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 212-220.

6 Mauro Cappelletti/Pietro Rescigno, Italy, in: *International Encyclopedia of Comparative Law*, Volume I (January 1972); Roberto Sacco, Italië, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 393-403; Mauro Cappelletti/John Henry Merryman/Joseph M. Perillo, *The Italian legal system: an introduction*, Stanford University Press, Stanford California 1967; G. Leroy Certoma, *The Italian legal system*, Butterworths, London 1985.

uniform law of contracts in both countries. This project was not realised, although this was in part due to the political developments in Italy. A whole new Italian Civil Code, which was partly based on the proposals of this committee, was drafted and enacted in 1942. The 'French' tradition is still manifest in regard to many regulations in this code, but on several points the solutions of the code were influenced by provisions and theories from other European countries, especially by regulations of the German and Swiss Civil Code and the Swiss code of obligations. An important feature of the Italian Civil Code is the fact that civil and commercial law are integrated in one single code. Italy does not have a separate commercial code anymore. The Civil Code contains six books, namely: persons and family, succession, property, obligations, labour, and the protection of rights. The Italian Civil Code of 1942 was modified several times (especially in 1944/1945 after the liberation of Italy) but it is still in force. The rules on civil procedure are given by the code on civil procedure of 1942 which replaced the previous codification on procedural law.

2.5 Luxembourg[7]

The Grand Duchy of Luxembourg was created at the Vienna Congress of 1815. The first Grand Dukes of Luxembourg were the Kings of the Netherlands of the House of Orange-Nassau. However, the legislation of the Netherlands was not enforced in Luxembourg and the Napoleonic legislation stayed in force even after the Netherlands introduced new codes in the field of civil law on its own territory in 1838. In 1890 after the death of King William III of the Netherlands, the personal union with the Netherlands ended. From that time onwards the Grand Dukes descended from another branch of the House of Nassau. Luxembourg never realised new codifications in the field of private law, but many smaller modifications of the codes were enacted. Nevertheless the main part of the codes still contain the original text of the Napoleonic times. The modifications of the codes were generally inspired by legislative precedents in France or Belgium. In this context one should recall that Belgium is also strongly influenced by French legal models.

7 Pierre Pescatore, Luxembourg, in: *International Encyclopedia of Comparative Law*, Volume I (March 1973).

2.6 Netherlands[8]

Since the southern provinces of the Netherlands were part of the French empire in this period, the Napoleonic legislation came into force in 1804 in these provinces. The northern provinces of the country constituted the Kingdom of Holland from 1806 to 1810 under King Louis-Napoleon. In this kingdom codes following the French model were introduced. A Civil Code (Wetboek Napoleon voor het Koningrijk Holland) came into force in 1809. In 1810 the whole territory of the modern Netherlands became part of the French empire and in 1812 the French codes came into force in the whole country. These codes remained provisionally in force with minor modifications in the Kingdom of the Netherlands (created at the Congress of Vienna) until separate codifications were enacted. On the field of private law the new Dutch codes were introduced on 1 October 1838 (Burgerlijk Wetboek (Civil Code), Wetboek van Koophandel (commercial code) and Wetboek van Burgerlijke Rechtsvordering (code of civil procedure)). The structure of the Civil Code differed from the French Code Civil, although many of the provisions were mere translations of the French original. Only in some matters the codes followed its own, more traditional Dutch solutions, like in the field of matrimonial property law and the law regarding the transfer of ownership. After an unsuccesful attempt in the nineteenth century, a project to recodify private law was started in 1947. In that year Professor Meijers was entrusted with the official task to make a draft for a new Civil Code. In 1970 the first book of this new code (on the law of persons and family) came into force, followed by a second book on the law of legal entities in 1976. In 1991 book 8 on the law of transport was put into force. Finally the core of the new code (book 3: general part of patrimonial law; book 5: law of property; book 6: law of obligations; parts of book 7: specific contracts) came into force on 1 January 1992. Book 4 (law of succession) and the other parts of book 7 will follow in the near future. Many provisions of this code still show the descendence of the French tradition, but on various points influences from other traditions are obvious. The code was prepared after

8 Arthur S. Hartkamp, Civil Code revision in the Netherlands 1947-1992/ La révision du code civil aux Pays Bas 1947-1992, in: P.P.C. Haanappel/ Ejan Mackaay, *Nieuw Nederlands Burgerlijk Wetboek/ Het Vermogensrecht* (New Netherlands Civil Code/ Patrimonial Law; Nouveau Code Civil Néerlandais/ Le Droit Patrimonial), Kluwer, Deventer 1990, XIII-XLVI; J.M.J. Chorus/ P.H.M. Gerver/ E.H. Hondius/ A.K. Koekkoek (ed.), *Introduction to Dutch Law for Foreign Lawyers*, Kluwer, Deventer 1993; Jan M. Hebly, *The Netherlands Civil Evidence Act 1988 and related provisions of the Netherlands Law of Evidence*, Kluwer, Deventer 1992; Elena Ioriatti, *Il nuovo codice civile dei Paesi Bassi, fra soluzioni originali e circulazione dei modelli*, Trento 1991; Thijmen Koopmans, Netherlands, in: *International Encyclopedia of Comparative Law*, Volume I (December 1971); Steven R. Schuit/ Marcel Romijn/ Gerrit H. Zevenboom, *Dutch Business Law, Legal, Accounting and Tax Aspects of Doing Business in The Netherlands*, Kluwer, Deventer, loose-leaf; H.C.S. Warendorf/ R.L. Thomas, *Companies and other legal persons under Netherlands Law and Netherlands Antilles Law*, Kluwer, Deventer, loose-leaf.

thorough comparative research and the Swiss, Italian and German codes, in particular, influenced the solutions chosen by the legislator in the Netherlands. On certain topics even Anglo-American theories influenced it. Like the Italian Civil Code the new code of the Netherlands integrates civil and commercial law. When all parts of the new code are in force the commercial code will be abolished.

2.7 Portugal

Portugal introduced a commercial code in the French tradition in 1833, which was totally revised in 1888 and strongly influenced by the Italian and Spanish commercial codes. In 1867 a Civil Code prepared by Professor Seabra of Coimbra University came into force. This code was on many points influenced by the French one, but the style and structure were different. The Portuguese code was more academic and contained many abstract definitions. In 1967 a new Civil Code was enacted, again in the French tradition, but also influenced by the German, Italian and Swiss codifications. Portugal maintained the division of civil law in two separate codes: the civil and the commercial code. In this sense the Portuguese code is very traditional. The structure of the Civil Code follows the German code, including the choice to start with a General Part. The code has been modified several times since 1967. The most drastic change took place in 1977 after democracy had been restored in Portugal. The content of the code was brought into agreement with the new constitution, while the opportunity was utilized to adjust the text of the code on many other places as well.

2.8 Spain[9]

Codes in the Napoleonic tradition were introduced during the rule of Joseph, a brother of Napoleon. After his decline these codes were abolished again. Nevertheless Spain tried to realise new codifications in the French style during the nineteenth century. A commercial code came into force in 1829 and was modernised in 1885. But Spain did not succeed in introducing an own Civil Code until 1889. In that year the Codigo civil of 1888 came into force. This code, which is still in force, is highly influenced by the French Civil Code. An important characteristic of the Spanish system is the fact, that next to the Civil Code some parts of the country have their own regulations in the field of civil

9 Diego Espin Canovas/Justino Duque Dominguez, Spain, in: *International Encyclopedia of Comparative Law*, Volume I (December 1986); Vincente L. Simo Santonia, Spanje, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 512-530; Thomas W. Palmer Jr, *Guide to the law and literature of Spain*, Hyperion Press, Westport Connecticut 1979.

law, the so-called derechos forales (compilation of local customary laws). Therefore, Spain has a pluralistic system of civil law.

Civil procedure is regulated by the Ley de enjuiciamiento civil (Code of Civil Procedure) of 1881.

3 The German Group

3.1 General Remarks

The reception of Roman law which has taken place since the Middle Ages had an important influence on the legal systems which belong to the German group. This was caused by the fact that there did not exist a central power; local landlords and cities held most of the power. Even though there was an emperor, the court was not fixed in one place, it moved from town to town. Contrary to the situation in for instance France or England, no centre where lawyers and legal academics were educated was developed. Due to this situation the easiest way to develop an own legal system was to update Roman law. Furthermore, the German emperors considered themselves as direct successors of the Roman emperors (compare the German expression: Römisches Reich deutscher Nation). Especially in Germany the so-called Pandectists tried to elaborate a scientific system of private law based on the principles of the Digestae (or Pandects) of the 'corpus iuris civilis' of the Roman-Byzantian emperor Iustinian. This school tried to transform the old Roman law into a contemporary legal system. A good example of these attempts was the important treatise of Friedrich Carl von Savigny on the system of modern Roman law ('System des heutigen römischen Rechts') published since 1840. In particular this treatise and the works of Puchta and Windscheid influenced the content of the legal systems of the German group and the commentaries written on the Civil Codes, which continue the tradition of the Pandectists. The consequence of this tradition is that the codes of the German group are much more systematic than the codification within other groups. Moreover, the 'general principles' play a considerably more important role.

3.2 Germany[10]

Before 1870 Germany did not exist as one state, and several independent states existed on the territory of Germany. Some of these states had Civil Codes in the

10 Dieter Medicus, Federal Republic of Germany, in: *International Encyclopedia of Comparative Law*, Volume I (December 1972); Ulrich Drobnig, Bondsrepubliek Duitsland, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 221-237.

French tradition (Baden; Rhineland), others knew codifications of another older tradition like Prussia (Allgemeines Landrecht 1794; General Land Law) or Bavaria (Codex Maximilianus Bavaricus 1756), again other states had no codification and the recepted Roman law was applied next to local statutes (usus modernus pandectarum). In the beginning of the past century there has been a discussion on the advantages and disadvantages of a codification of private law for the whole territory of Germany (Thibault and Von Savigny). Uniform Commercial Code (Allgemeines Deutsches Handelsgesetzbuch) was already created in 1861, before the establishment of the German empire in 1870. This code was replaced by a new one on 1 January 1900. In 1877 a Code on Civil Procedure (Zivilprozessordnung) and a law on bankruptcy (Konkursordnung) were put into force, followed by a Civil Code (Bürgerliches Gesetzbuch) on 1 January 1900. This code was highly influenced by the recepted Roman law.

After the decline of the German empire in 1918 the Civil Code remained in force during the period of the Weimar republic and the subsequent Third Reich. After the Second World War two separate German states arose on the territory of Germany, the Federal Republic of Germany and the German Democratic Republic. The Civil Code remained in force in both states, until an independent Zivilgesetzbuch was enacted in the German Democratic Republic in 1975, which came into force on 1 January 1976. After the reunification of Germany in 1990 the Civil Code came into force on the whole territory again.

A special feature of the German Civil Code is the fact that it has a 'General part' as first book, giving rules applicable on the matters regulated by all following books. The structure of the Bürgerliches Gesetzbuch is definitely more systematic than the structure of the French Code Civil. It is not surprising, that many commentaries in Germany follow the order of the articles of the Civil Code. In France this would be impossible from systematic point of view.

3.3 Austria[11]

The Civil Code of Austria (Allgemeines Bürgerliches Gesetzbuch; General Civil Code) came into force on 1 January 1812 and therefore it belongs to the oldest codes still in force in Europe. The preparation of the code began in 1753 with the appointment of a committee, by Empress Maria Theresia, given the task to draft a Civil Code. The committee had to compile existing law and fill in the gaps according to 'right reason'. A first draft (known as the Codex Theresianus) was presented to the empress in 1767, but was rejected because it contained too many provisions and it stayed too close to Roman law. Therefore a new draft

11 Fritz Schwind/Herbert Zemen, Austria, in: *International Encyclopedia of Comparative Law*, Volume I (October 1971).

had to be prepared. In 1786 a draft statute on the law of persons and family was presented to Emperor Joseph II and it was enacted with minor modifications in 1787 as Josephinisches Gesetzbuch. In 1790 Emperor Leopold II appointed a new committee under supervision of Von Martini who were to process the other parts of the Codex Theresianus. In 1796 this committee presented a draft (known as the Martini draft) which was put into force in Galicia in 1797 as an experiment. Based on the Martini draft and the experiences in Galicia a new committee under the leadership of Von Zeiller adopted the final text of the code. The new Civil Code came into force on 1 January 1812. It was slightly influenced by the code of Prussia; the French Civil Code did not influence the regulations of the Austrian code. The code is mainly based on principles of Roman law with strong influences from natural law doctrine. Although the Austrian code is much older than the German, Austria is generally included in the countries with a 'German' tradition. The reason for this is the fact that German doctrine influenced the interpretation of the Austrian code on many points. This is caused by the intensive exchange of academic scholars between Austria and Germany. Many Austrian specialists on private law were teaching in Germany and vice versa. Since 1900 many revisions of the Austrian Civil Code were influenced by German models, especially the important revisions of the code during the years 1914, 1915 and 1916. From 1938 until 1945 Austria was a part of Germany, but the Austrian Allgemeines Bürgerliches Gesetzbuch stayed in force. During this period the German Commercial Code (Handelsgesetzbuch) was put into force in Austria and it remained in force after the new independance in 1945.

3.4 Greece[12]

Even during the time of the Turkish domination Roman-Byzantinian law was applicable in Greece. This situation was maintained after the country became independent in the beginning of the nineteenth century. During that century several statutes, influenced by Austrian, French and German law, were enacted. Gradually, the German school of Pandectists gained influence in Greece, partly caused by the fact that a Bavarian prince became king of Greece. Since the first half of the nineteenth century committees were working on the preparation of a new Civil Code. A draft was published in 1878, but never enacted. A text of a Civil Code was not promulgated until 1940, which came into force on 23 February 1946. The Greek Civil Code has a Roman-Byzantinian basis and is largely influenced by the German code, whose structure it follows. It takes into account many rules given by German courts based on the German Civil Code.

12 Charalambos Fragistas, Greece, in: *International Encyclopedia of Comparative Law*, Volume I (February 1976); Konstantinos D. Kerameus, Griekenland, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 350-364; Konstantinos D. Kerameus/ Phaedon J. Kozyris (ed.), *Introduction to Greek Law*, Kluwer, Deventer 1988.

Furthermore, some provisions are inspired by the Swiss, French and Italian codes. Commercial law is regulated by a Commercial Code which is an official translation of the French commercial code of 1807. The translation was published in 1835 but it has since been modified by many enacted statutes. The rules regarding civil procedure are laid down in a Code of Civil procedure, which came into force on 16 September 1968.

3.5 Switzerland[13]

In the nineteenth century almost all of the Swiss cantons introduced their own codes in the field of private law. Some cantons followed the model of the French Code Civil, others were inspired by the Austrian Civil Code, again others were influenced by the German school of Pandectists. In 1881, a federal code of obligations (Obligationenrecht) was enacted. This unification was made possible by the enactment of the Federal Constitution of 1874, which allowed federal legislation in all legal matters related to commerce and movables. After an amendment of the constitution, allowing federal legislation on all of the other matters of civil law as well, a Civil Code (Zivilgesetzbuch, which covers the law on persons and family, the law of succession and the law of property) was enacted in 1907. It was put into force in 1912. The time between the enactment and coming into force of the new Civil Code was utilized to carry out a partial revision of the code of obligations of 1881 (first and second divisions (General part and Specific contracts), Art. 1-551), which became the fifth part of the Civil Code. The provisions of this fifth book remained numbered separately. Another important revision of the code of obligations took place in 1936, when the third division (Commercial Companies and Co-operatives) of this code was revised. Switzerland does not know a real distinction between civil and commercial law, it does not have a separate commercial code. The code of obligations covers many topics which are regulated in the commercial codes in several other continental European countries. The Swiss Civil Code was mainly the work of one single man, Eugen Huber, who based his draft, inter alia, on his comprehensive comparative study of the civil laws of the cantons.[14] The rules on civil procedure are mainly given on the level of the cantons, only in cases directly brought before the Federal Tribunal the procedural law is regulated on federal level.

All Swiss legislation is published in three of the national languages of Switzerland: German, French and Italian.

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13 Walter Stoffel, Switserland, in: *International Encyclopedia of Comparative Law*, Volume I (March 1987); Fritz Sturm, Zwitserland, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 642-656.

14 Eugen Huber, *System und Geschichte des Schweizerischen Privatrechts, 1886-1889.*

4 Nordic Countries

4.1 General Remarks

An important number of similarities exist between the legal systems of the Nordic countries. In the first place the general impact of Roman law was less than in other parts of the European continent. In the second place similarities are caused by the fact that there were quite a lot of political unions between the Scandinavian countries in the past. Through the Union of Kalmar in 1397, the Nordic kingdoms were united under Danish domination: Queen Margareta of Denmark, who was already Queen of Norway and the Norwegian dependencies of Iceland and Greenland since 1380, became the Queen of Sweden (including the territory of Finland, which was occupied by the Swedish in the twelfth century) as well. In 1523 Sweden (with Finland) reacquired independence (under the House Wasa). At the peace together conference of Frederikshamm (1809) Sweden had to cede Finland to the Russian empire. Finland got the status of a Russian Grand Duchy with considerable autonomy in legal affairs. After the Russian October Revolution Finland declared its independence in 1917. At the peace treaty of Kiel in 1814 Denmark had to cede all its rights on Norway to Sweden, but it did not give up its rights to the old Norwegian dependencies of Iceland, the Faroes and Greenland. Within the Swedish kingdom Norway had a certain autonomy and in 1905 Norway obtained independence. Last but not least, similarities are caused by a close co-operation in legislation between the Nordic countries. This co-operation started with 'de nordiska juristmotene' (Congress of Nordic lawyers), which met for the first time in 1872 and which has met then every three years from then. On the initiative of this association, several co-ordinated statutes were enacted in the Nordic countries, in the beginning mainly in the field of commercial law, later in the field of contracts and family as well. In 1953 a Nordiska Rad (Nordic Council) was founded with the goal to develop new initiatives on the field of legislative co-ordination and supervision on the implementation of co-ordinated legislation by the governments of the Nordic countries. An important legal basis for this co-operation is an Agreement between Finland, Denmark, Iceland, Norway and Sweden Concerning Co-operation, signed at Helsinki on 23 March 1962.[15] The legal co-operation between the Nordic countries is facilitated by the fact that the Scandinavian languages are closely related. An exception is of course Finnish, but the legal system of Finland is bilingual Finnish-Swedish.

15 434 UNTS 182-197 for the English and French texts of this agreement.

4.2 Denmark[16]

In 1683 King Christian V brought into force a comprehensive code for the whole of Denmark, the so-called Danske Lov (Danish Law). This code covered the entire private, criminal and procedural law and abolished all previous legislation. It was very casuistic and contained very few general principles. The Danske Lov was never totally repealed, but only few of the original provisions are still in force, like the regulations on vicarious liability. Nowadays, important parts of Danish private law are mainly case law. Furthermore, statutes prepared by inter-Nordic committees play an important role. Important statutes on the area of private law are the Tinglysningsloven (Land Registration Act) of 31 March 1926, the Lov om aftaler og andre retshandler på formuerettens område (Law on Contracts and other transactions within the field of property law) of 8 May 1917 and the Kobeloven (Sale of Goods Act) of 6 April 1906.

Commercial law is not regarded as a separate branch of the law. The principles of judicial procedure in civil matters are regulated by the Retplejelov (law on civil procedure) of 11 April 1916.

4.3 Finland[17]

Finland was part of Sweden from the beginning of the thirteenth century until the beginning of the nineteenth century. From 1809 until 1917 it was an autonomous Grand Duchy within the Russian empire. Finland's legal system has been greatly influenced by Swedish law, especially by the Sveriges Rikes Lag (Swedish General Code) of 1734. This code covered both private, criminal and procedural law. It did not cover all of the law on these areas but only those parts which were considered suitable for legislative action, so it was very pragmatic. Certain parts of the code are still in force in Finland, like the chapter on succession, which was totally revised in 1965, and the chapter on procedure. The main part, however, has been repealed and replaced by legislation prepared by the inter-Nordic committees, especially on the field of private and commercial law, like the laws on marriage (1929), contracts (1929), instruments of debt (1947), conditional sales (1966) and patents (1967).

16 Mogens Koktvedgaard, Denmark, in: *International Encyclopedia of Comparative Law*, Volume I (March 1972); Torben Svenné Schmidt, Denemarken, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 247-255.

17 Heikki Jokela, Finland, in: *International Encyclopedia of Comparative Law*, Volume I (December 1972); Tore Modeen, Finland, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 303-310.

4.4 Iceland[18]

Iceland was settled in the ninth century by the Nordic Vikings. In 1262 the Icelanders swore allegiance to the King of Norway. Iceland came, together with Norway, under Danish domination in 1380. At the Treaty of Kiel in 1814, Denmark had to cede Norway to Sweden, but it was explicitly decided that Iceland, Greenland and the Faroe Islands remained under the Danish crown. In 1918 Iceland became a completely independent state, united with Denmark solely by the monarchy and a common foreign policy. When the Germans occupied Denmark in 1940, the Islandic government took over all functions, including those previously conducted by the king or the Danish foreign office. In 1944 the Republic of Iceland was proclaimed.

Iceland always had its own laws. Norwegian and Danish law was never directly enforced in Iceland but it enjoyed considerable influence, especially in the eighteenth and nineteenth centuries. The separate identity of Islandic law was underlined in 1874 when the Islandic parliament (Althing) got legislative power in internal affairs. An independent law school was established in 1908. Nevertheless Islandic laws are closely related to the laws of other Nordic countries. Many statutes on the field of private law have been drafted by inter-Nordic committees and then enacted in the Nordic countries with minor modifications. Especially in the field of property and obligations Islandic law is very simular to Danish and Norwegian law. Differences exist regarding the land registration, mortgages and the ownership of real estate. The Icelandic statute on contracts (7/1936) is almost literally identical to the Danish statute of 1917, and the Sale of Goods Act (39/1922) is practically the same as the Danish statute of 1906.

Commercial law is considered to be an integral part of private law. Procedural law is regulated by an Act of 1936 and follows the example of the Danish law on civil procedure.

4.5 Norway[19]

Since the Kalmar Union (1397) Norway remained in a union (ultimately as a province) with Denmark until 1814. It is therefore not surprising that the Danish code of 1683 (Danske Lov) was brought into force in Norway in 1687 as Norske Lov (Norwegian Law). It has been modified innumerable times since

18 Thór Vilhjálmsson, Iceland, in: *International Encyclopedia of Comparative Law*, Volume I (December 1972).

19 Peter Lodrup, Norway, in: *International Encyclopedia of Comparative Law*, Volume I (May 1972); C.C.A. Voskuil, Noorwegen, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 454-480.

then. Norway does not make a distinction between civil law and commercial law, the latter is an integrated part of private law. In the field of private law many statutes are prepared by inter-Nordic committees. Therefore, many similarities exist with statutes in other Nordic countries. An important feature of Norwegian law is its anti-conceptualistic character: few terms and concepts are of a general nature or application. In the field of private law some statutes should be mentioned explicitly: the statute on the sale of goods of 1907, the statute on contracts of 1918 and the statute on tort claims of 1969. The rules on civil procedure are regulated by a statute of 1915.

4.6 Sweden[20]

During the fourteenth century, the law in Sweden was unified in two different codes: the Stadslag for the towns and the Landlag for the rest of the country. These medieval codes were not directly influenced by Roman law, but the influence of Canonic law was obvious. In 1734 a codification for the whole country was realised, known as Sveriges Rikes Lag (Swedish general code). This code covered all legal fields, including private law, criminal law and the law of procedure. It was casuistic and not very systematic. It contained nine books, known as *balkar*. Since its enactment Sveriges Rikes Lag was modified innumerable times. Only few provisions of the original text are still in force, but the formal framework of the code and its structure still exist. Many *balkar* are replaced by new statutes, also called *balkar*. Several of these *balkar* are the result of Nordic co-operation in legal affairs. But also outside of the framework of Sveriges Rikes Lag many statutes regulate private law matters. Important *balkar* and other statutes are: the Jordabalk (law on immovables) of 1970, the Avtalslag (Law of Contracts) of 1915, the Köplag (Sale of Goods Act) of 1905, the Skuldebrevslagen (Law on Promissory Notes) of 1936 and the Skadeståndslag (law on the compensation for damages) of 1972. Commercial law is not regarded as a separate discipline, a special commercial code does not exist. The principles of civil procedure are regulated by the Rätgångbalk (procedural code) of 1942.

20 Åke Malmström, Sweden, in: *International Encyclopedia of Comparative Law*, Volume I (June 1983); Michael Bogdan, Zweden, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 635-641; Stig Strömholm (ed.), *An introduction to Swedish law*, Norstedts Förlag, Stockholm 1988.

5 The Anglo-American Group

5.1 General Remarks[21]

The countries belonging to this family are the countries with a Common Law system, as opposed to the countries belonging to the Civil Law system, which contains all legal systems based on Roman law. The distinction between common law and civil law can also be summarized by the distinction between judge made law and statute law. Generally speaking these distinctions are correct but one has to bear in mind that they tend to be too rigid since the common law has indirectly been influenced by Roman law. Furthermore, there is a tendency in these countries to codify certain areas of law.

The origins of the common law can be dated back to the Battle of Hastings (1066), when the Normans under the leadership of William Duke of Normandy conquered England. From this period on the administration of law, previously in the hands of local sheriffs, became centralised in the king and his court. Former customary law, which varied from district to district, was gradually replaced by the common law as developed by the king's court (Curia regis) from which later special courts derived: the Court of Exchequer, primarily entrusted with tax cases, the court of King's Bench, dealing with cases in which interests of the Crown were involved and the court of Common Pleas, dealing with disputes between civilians. The administration of law was very casuistic. This led to a strong emphasis on procedures; if there ought to be a remedy in a specific case, there ought to be a right. A procedure could only be started if a so-called writ was issued, a kind of summons issued by the king or his Chancellor on the request of the plaintiff. From the end of the twelfth century the writs became standardized and for each type of action a writ was developed, like the writ of trespass, debt or right. All these writs were collected in the Register of Writs. Each writ embodied a particular form of action, a sort of scenario for the trial. If the plaintiff chose the wrong writ he lost the case. If no appropriate writ was available one could petition the king to issue an action. These petitions were frequently dealt with by the king's Chancellor, who was his main advisor and 'keeper of the King's conscience'. Gradually this resulted in a Chancery Court with a separate jurisdiction from and complementary to the common law courts. Thus two separate legal systems developed side by side, the common law and equity. One important distinction between them is that in the common law system personal circumstances and personal behaviour do not play a role, the judge can only decide on the basis of facts, while in equity the Chancellor has

21 Kenneth R. Simmonds, United Kingdom, in: *International Encyclopedia of Comparative Law*, Volume I (January 1975); Edgar Bodenheimer/John Bilyeu Oakley/Jean C. Love, *An introduction to the Anglo-American legal system*, West Publishing co., St. Paul, Minnesota 1980; J.H. Baker, *An introduction to English legal history*, Butterworths, 1990.

to decide upon personal circumstances and natural equity (fairness). This led to the development of two different kind of remedies, the common law remedies and the equitable remedies. The rules of common law and equity developed independently from each other in different courts. In the beginning of the seventeenth century this led to growing rivalry between these courts, finally resulting in the rule that on the one hand equity follows the law, on the other hand equity prevails; equity only comes into action if a common law verdict is unfair in its specific result, but if a verdict has been given by an equity judge common law judges have to respect it. Due to the inefficiency of the existence of two separate legal systems a reform at the end of the nineteenth century led to the Judicature Acts (1873-1875), in which all existing courts were fused into one Supreme Court of Judicature, consisting of a High Court and a Court of Appeal. This court could apply either system, also since the system of writs had been abolished in 1852 (Common Law Procedure Act). In case of a conflict between the rules of common law and equity, the latter prevails.

Another special feature of the common law system is the doctrine of precedent (stare decisis). All judges are bound by the decisions of the superior courts. Principles arising from earlier cases have to be applied by judges, even if this principle was developed years ago. The superior courts themselves felt bound by their own precedent as well, until in 1966 the Lord Chancellor declared that the House of Lords, the highest court, would not feel bound by its own decisions anymore if it was of the opinion that upholding such decision would not be just. The Court of Appeal, however, remains bound by its own decisions.

In the nineteenth century there was a growing tendency to more legislation, but on the overall view this still was very marginal and judge made law remained the main source of law. Nevertheless, the call for codification remains and is even getting louder, also due to the social changes that have occured over the last hundred years. As a result a Law Commission for England and Wales and one for Scotland were installed in 1965, given the task to keep 'under review all the law... with a view to a systematic development and reform, including in particular the codification of such law, the elimination of anomalies (and) the repeal of unnecessary enactments'.[22] But due to the fact that the legislator does not accept any general rules or broadly described principles only legislation on very specific topics has proved realizable. On the field of the law of obligations three important acts exist, the Sale of Goods Act (1979) which consolidates with some amendments the original Sale of Goods Act (1893), the Supply of Goods and Services Act (1982) and the Unfair Contract Terms Act (1977), a consumer protection act. On the field of family law there has been a lot of codification but this has not been brought together in a systematic code. Nevertheless this

22 Law Commission Act 1965 (c.22) s.3, as cited in Kenneth R. Simmonds, United Kingdom, in: *International Encyclopedia of Comparative Law*, Volume I (January 1975), U-73.

codification is known as the Family code. The most important acts on this area are the Guardianship of Minors Act (1971), the Matrimonial Causes Act (1973), the Children Act (1975), the Matrimonial and Family Proceedings Act (1984) and the Family Law Reform Act (1987).

5.2 England, Wales and Northern Ireland[23]

The English system as described above was implemented in Wales in 1536, when the unification of England and Wales was completed. All former Welsh laws, mainly deriving from customary law (like the laws of Hywel Dda), were abrogated. In 1830 England and Wales became one unified jurisdiction when procedures were assimilated. The Act of Union of 1800 united Great Britain with Ireland. In 1921 Ireland parted into Northern and Southern Ireland and only Northern Ireland remained united with Great Britain. The Irish legal system and its courts remained to exist, but there is hardly any difference with the English system, also due to the fact that most of the Irish lawyers received their vocational training in England.

5.3 Ireland[24]

Ireland became an independent state in 1921 after a liberation war against England. Since the seventeenth century the English common law system completely ousted the original Irish legal system. This situation was maintained after Ireland became independent. Irish civil and commercial law is in essence similar to English law, in both statute and common law. The law of contracts, for example, is almost entirely based upon precedents. Since 1960 Ireland has tried to bring Irish law closer to the legal rules prevailing on the continent of Europe. It codified the principles for civil liability for accidents in 1961, succession law was totally codified in 1965, land ownership was regulated by the registration of title act of 1964. The family law of the Republic of Ireland is influenced by the opinion of the Roman Catholic church in family matters.

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23 J.G. Sauveplanne/G.J.W. Steenhoff, Engeland, in: D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek*, Kluwer, Deventer 1988, 256-302.

24 Paul O'Higgins, Ireland, in: *International Encyclopedia of Comparative Law*, Volume I (July 1972).

5.4 Scotland[25]

The Scottish legal system was originally based on feudal and customary law, to be administered by sheriff courts. In 1532 the Court of Session was established as a permanent court of justice. Due to the political situation in the period from the fourteenth to the seventeenth century (Scotland fought lenghty wars with England), Scottish law has been greatly influenced by Roman law since many lawyers went to the continent for their judicial education. In 1603 James VI, King of Scotland, took up the English crown after the death of Elizabeth I and thus he became James I of England. The merger of the English and Scottish crowns led to a political unification in 1707 in the Treaty of Union, when the State of Great Britain was created. The separate parliaments were abolished and one parliament was established. But even after the Union the Scottish legal system evolved separately from the English system, no assimilation of the two legal systems took place. After the Union the independence of the Court of Session was protected, thus preserving the own face of the Scottish legal system. But Scottish law has been influenced by English legal ideas since then and the influence of Roman law has gradually declined. As in England, there was a tendency towards codification in the nineteenth century, especially on the fields of property and commercial law. In 1965 the Law Commission for Scotland was set up and, one of its tasks was, the investigation of the possibilities of codification of the law. At the moment there is a strong awareness of an own identity in Scotland, which also influences the ideas of the Scottish legal thinking.

5.5 British European Dependencies[26]

The British European dependencies are not a part of the United Kingdom, but they are British Crown dependencies. These dependencies consist of the Channel Islands and the Isle of Man. The Channel Islands, the main ones being Jersey and Guernsey, have been attached to the British Crown since 1066. The legal system of the islands can be traced back to Norman customary law, the Ancienne Coutume de Normandie. Even though the legislation and administration are in the hands of the British Crown, the English common law system was not implemented here. The Isle of Man has its own legislation and

25 Kenneth R. Simmonds, United Kingdom, in: *International Encyclopedia of Comparative Law*, Volume I (January 1975); David M. Walker, *The Scottish legal system*, W. Green & Son Ltd, Edinburgh 1981; Enid A. Marshall, *General principles of Scots law*, W. Green & Son Ltd, Edinburgh 1982; David M. Walker, *Principles of Scottish Private Law*, Claredon Press, Oxford 1982-1983 (3 volumes).

26 Kenneth R. Simmonds, The British Islands, appendix to United Kingdom, in: *International Encyclopedia of Comparative Law*, Volume I (January 1975).

administration, but the legal system of the isle is substantially similar to English law.